

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFFORD WAYNE POWERS,

Defendant and Appellant.

F077024

(Super. Ct. No. 1022118)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Stanislaus County. Thomas D. Zeff, Judge.

Rachel Lederman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Melissa Lipon, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Levy, Acting P.J., Detjen, J. and Smith, J.

Appellant Clifford Wayne Powers appeals from the trial court's order extending his civil commitment to the State Department of State Hospitals at Napa as a mentally disordered offender (MDO). (Pen. Code, § 2972.)¹ On appeal, Powers contends the evidence is insufficient to support the court's order extending his MDO commitment. We affirm.

FACTS

On April 18, 1990, Powers was sentenced to 18 years in prison on his convictions for spousal rape (§ 262), rape by a foreign object (§ 289, subd. (a)(1)(A)), and forcible sodomy of his 13-year-old stepdaughter (§ 286, subd. (c)(1)).

In 2001, while on parole, Powers was diagnosed with and treated for schizoaffective disorder, depressive type. On September 28, 2001, the court committed Powers to Atascadero State Hospital as a MDO for one year. (§ 2970.) Thereafter, his involuntary treatment was extended each year through 2017.

On July 26, 2017, the Stanislaus County District Attorney filed a petition pursuant to sections 2970 and 2972 to extend for another year Powers's involuntary commitment as a MDO at the Napa State Hospital, where he was then being treated.

On February 2, 2018, Powers waived his right to a jury trial. On February 5, 2018, at a hearing on the petition, Dr. Aaron Bartholomew testified he had known Powers since around April 2016 when Powers was placed in his unit to stabilize his self-harming behaviors. According to Bartholomew, Powers suffered from a severe mental disorder, depression with psychotic features. Powers had a history of depressive episodes that lasted more than two weeks during which he would be in a depressed mood, was irritable, did not enjoy participating in activities, and would engage in self-harming behaviors. This led to a significant impairment in his ability to function.

¹ All further statutory references are to the Penal Code.

Although Powers had also been diagnosed with schizoaffective disorder, depressive type, he reported he had not heard voices in 20 years. According to Bartholomew, depression with psychotic features and schizoaffective disorder, depressive type can be related and someone with severe depression can have psychotic symptoms. Many times, the difference in diagnosis depends on whether the primary symptom is depression or psychotic symptoms.

Powers had previously been released into the community on the Conditional Release Program (CONREP), but he was terminated because he violated the program's rules several times. While he was in the program, there were also concerns that he would be in vehicles with females, which was unauthorized, that he was gambling, and that he was fraudulently receiving money from financial institutions.

During the past year, there were many reports of behavior by Powers that concerned Bartholomew. In February 2017, there were two incidents during which Powers was observed violating hospital rules by attempting to use the telephone with a peer to procure items or phone cards for himself. In one incident, Powers impersonated a peer and in the other one, Powers asked a peer to have his family pay for items for Powers.

In March 2017, there were three incidents of concern. During one incident, when staff redirected Powers, he became verbally aggressive and left without permission. During another incident, Powers became involved in a verbal altercation with a peer that escalated into a physical fight. Powers was also caught trading food items with a peer, in violation of hospital rules.

In April 2017, Powers expressed suicidal thoughts to staff, asking them how he could kill himself and telling them that he might use a DVD for that purpose.

In May 2017, staff again observed Powers on the phone with a peer using the peer's phone card. He was also seen bringing food back to his unit, in violation of hospital rules. During another incident that month, Powers came out of a bathroom with

superficial cuts on his neck and wrist and reported that he had ingested a metal object. Powers was hospitalized and X-rayed. The X-ray disclosed that he had swallowed a metal object. In subsequent discussions, Powers told Bartholomew that he smuggled a razor out of the jail in a shampoo bottle during his last court appearance and swallowed it after using it to cut himself. This latter incident was of particular concern to Bartholomew because it suggested Powers continued to experience depressive thoughts, suicidality, and impulsivity, which are symptoms of depression. During that time, Powers was taking his medications.

In June 2017, Powers told staff that he swallowed batteries, which was something he had historically done. However, he was X-rayed and nothing was found. Later that month, he argued with staff and became verbally aggressive with them. Despite being redirected, Powers would not back away and he kept moving towards the staff and threw papers at them, requiring them to set off an alarm.

In July 2017, there were two incidents. During the first incident, Powers had a verbal conflict with a peer. During the second, he had a verbal conflict with another peer and chased him down the hallway intending to push him.

Based on the foregoing incidents, Bartholomew opined that Powers was not in remission and that he needed continued treatment for his safety and that of others. Bartholomew also opined that Powers did not have “full” insight with respect to his sexual offenses. Although he acknowledged raping his wife, he continued to deny any knowledge or awareness that he sexually assaulted his stepdaughter and he lacked any understanding of those offenses. Powers acknowledged a history of domestic violence, but claimed he was also a victim of that violence.

Powers’s lack of insight concerned Bartholomew because if Powers did not understand why he committed his sexual offenses he might not know how to engage differently with people in the future and that sexual behavior might again occur. Additionally, if he did not fully understand how the relationship dynamics impacted the

domestic violence with his wife or what contributed to the sexual assault of his stepdaughter, that also put him at risk of reoffending if he were in a relationship.

Bartholomew further testified that when he made his last report, Powers told him he did not want to be released on the CONREP and had a negative view of it because he was taken off the program for violating its rules. However, he recently stated he was willing to return to the program if absolutely necessary. Bartholomew was concerned with Powers's ambivalence towards supervision and treatment in the community because it suggested that Powers minimized the potential risk and factors he would have to address to keep himself and others safe in that setting.

Powers had made some improvements in his discharge plan. However, although he expressed a willingness to attend sex offender treatment, Alcoholics Anonymous/Narcotics Anonymous meetings, and occasionally visit a psychiatrist, he had not been able to explicitly talk about what other treatment he would need in the community. Thus, Bartholomew concluded that Powers was not ready to go on outpatient treatment and that he was best served by remaining in a hospital setting.

During cross-examination, Bartholomew testified that in his opinion Powers presented a danger of physical harm to others if he was released into the community unsupervised. Bartholomew also testified that despite medication and psychosocial support, Powers continued to exhibit symptoms of depression, including irritability, depressed mood, and some lack of energy. If he were in the community and began using illegal drugs it would compromise his ability to make good decisions and to follow a relapse program, and it would impair his judgment and decision making. He further testified that the hopelessness that can accompany depression can reduce inhibitions to engage in risky, self-harming, or aggressive behavior. The irritability can make a person more impulsive and less able to regulate his emotions or actions.

At the conclusion of the hearing, the court found true the allegations in the petition and ordered Powers recommitted to Napa State Hospital for one year.

DISCUSSION

Powers contends the evidence is insufficient to sustain the order extending his commitment because it failed to show that at the time of the hearing Powers was physically dangerous to others because of: (1) the severe mental disorder for which he was treated as a condition of parole, i.e., schizoaffective disorder, depressive type; or (2) the depression from which he suffered. We reject these contentions.

Standard of Review

“The substantial evidence rule applies to appellate review of the sufficiency of the evidence in MDO proceedings. [Citation.] We review the record in the light most favorable to the judgment to determine whether it discloses substantial evidence—‘evidence that is reasonable, credible, and of solid value’—such that a reasonable trier of fact could find beyond a reasonable doubt that the commitment offense was a qualifying offense under the MDO statute.” (*People v. Labelle* (2010) 190 Cal.App.4th 149, 151.)

MDO Commitments

“ ‘The MDO Act establishes a comprehensive scheme for treating prisoners who have severe mental disorders that were a cause or aggravating factor in the commission of the crime for which they were imprisoned. (See § 2960.) The act addresses treatment in three contexts—first, as a condition of parole (§ 2962); then, as continued treatment for one year upon termination of parole (§ 2970); and finally, as an additional year of treatment after expiration of the original, or previous, one-year commitment (§ 2972).’ [Citation.]

“Section 2962 lists six criteria that must be met for the *initial* MDO certification. ‘The trial court must consider whether 1) the prisoner has a severe mental disorder; 2) the prisoner used force or violence in committing the underlying offense; 3) the severe mental disorder was one of the causes or an aggravating factor in the commission of the offense; 4) the disorder is not in remission or capable of being kept in remission without treatment; 5) the prisoner was treated for the disorder for at least 90 days in the year before his release; and 6) by reason of his severe mental disorder, the prisoner poses a serious threat of physical harm to others. (§ 2962, subds. (a)-(d)(1).)’ [Citations.]

“Three of the criteria are relevant *only* to the initial certification. These three ‘concern past events that once established, are incapable of change: whether the prisoner used force or violence in committing the underlying offense; whether he was treated for the disorder for at least 90 days in the year before his release; and whether his severe mental disorder was one of the causes or an aggravating factor in the commission of the underlying offense.’ [Citations.]

“By contrast, the three criteria that must be satisfied for continued treatment relate, not to the past, but to the defendant’s current condition. At an extension proceeding, the questions are: Does the defendant continue to have a severe mental disorder? Is the disorder in remission? Does the defendant continue to represent a substantial danger of physical harm to others? (§ 2972, subd. (c).)” (*People v. Cobb* (2010) 48 Cal.4th 243, 251–252 (*Cobb*).)

The Prosecutor Was Not Required to Prove Powers Was Suffering from the Same Severe Mental Disorder He Was Treated for as a Condition of Parole

Powers cites *People v. Garcia* (2005) 127 Cal.App.4th 558, 567 (*Garcia*) to contend the prosecutor was required to show he was dangerous to others because he was suffering from the same disorder for which he was treated as a condition of parole. Thus, according to Powers, since Bartholomew did not testify that Powers was currently dangerous because he suffered from schizoaffective disorder, depressive type, the evidence is insufficient to sustain the court’s commitment order. Powers is wrong.

Section 2962 sets forth the criteria that must be met for initial certification as a MDO. (*Cobb, supra*, 48 Cal.4th at pp. 251–252.) As the Supreme Court noted in *Cobb*, the criteria for recommitment relates to the defendant’s current condition. (*Ibid.*) Nothing in the statute or the MDO Act, and no case of which we are aware, requires that a subsequent recommitment must be based on the same disorder that was the basis for the initial certification or on the disorder that he was treated for as a condition of parole.

Powers’s reliance on *Garcia* is misplaced. In *Garcia*, the defendant’s mental health treatment was initiated as a condition of parole and treatment occurred during the parole period, at the conclusion of which the medical staff determined the defendant’s medical disorder was in remission and could be kept in remission. (*Garcia, supra*, 127

Cal.App.4th at p. 565.) Despite this diagnosis, the district attorney filed a petition to declare the defendant a MDO and subject to involuntary treatment after the expiration of the parole period.

The appellate court concluded the district attorney had no authority to file a petition to subject the defendant to involuntary commitment after the parole period when the mental disorder for which he had been treated during the parole period was in remission and could be kept in remission. (*Garcia, supra*, 127 Cal.App.4th at p. 565.) Nevertheless, the court also found that the requirement that “the prisoner ‘ ‘has been in treatment for the severe mental disorder for 90 days or more within the year prior to the prisoner’s ... release[.]’ ’ ” meant that “[t]he mental disorder for which extended involuntary treatment is sought must be the same mental disorder for which defendant was treated as a condition of his parole.” (*Id.*, at p. 567.)

Garcia is easily distinguishable because it did not involve a subsequent recommitment as is involved here. In any case, the above finding in *Garcia* is dicta and contrary to the Supreme Court’s holding that the requirement of treatment for 90 days in the prior year *applies only to the initial MDO certification* (*Cobb, supra*, 48 Cal.4th at p. 252). Accordingly, we reject Powers’s contention that the evidence is insufficient to support the court’s commitment order because it failed to prove his schizoaffective disorder made him dangerous to others.

The Evidence Supports the Court’s Finding that Powers’s Major Depression Disorder Made Him Dangerous to Others

Powers does not dispute that the evidence supports a finding that he suffered from a severe mental disorder, i.e., major depression disorder with psychotic features, and that it was not in remission. We conclude the evidence also supports a finding that he posed a serious risk of physical injury to others because of his depression.

During the previous year, Powers violated hospital rules on several occasions, including when he attempted to defraud some of his peers and when he smuggled a razor

from jail. He also engaged in aggressive conduct against peers and staff. The court could reasonably infer from Powers's inability to follow institutional rules and his aggressive conduct in a supervised setting that his dangerousness to others would increase outside the hospital because there would be fewer restraints on his conduct.

Moreover, the opinion of a single psychiatric expert that a defendant is currently dangerous due to a mental disorder can constitute substantial evidence to support the extension of a MDO commitment. (*People v. Zapisek* (2007) 147 Cal.App.4th 1151, 1165.) Bartholomew in essence testified that, in his opinion, if Powers were released into the community, he represented a substantial danger of physical harm to others because of his depression and to several circumstances that supported his opinion. According to Bartholomew, Powers's inadequate insight into the cause of his sexual offenses and how the dynamics of his relationship with his wife impacted his domestic violence involving her put him at a risk of reoffending. Bartholomew further testified that Powers's ambivalence towards supervision and treatment in the community was concerning because it indicated that Powers minimized the potential risk and the factors he would have to address to keep himself and others in the community safe. Additionally, the hopelessness and irritability Powers continued to experience could reduce his inhibitions to engage in risky and/or aggressive behavior. Powers's inability to control his behavior in a supervised environment also supported Bartholomew's opinion of Powers's dangerousness. Therefore, since the record contains ample evidence that Powers presented a substantial danger of physical harm to others because of a severe mental disorder, i.e., depression, we reject Powers's contention that the evidence is insufficient to support the court's order extending his MDO commitment.

DISPOSITION

The order extending Powers's mentally disordered offender commitment is affirmed.